Brief In Support of Petition For Writ of Certiorari

OPINIONS BELOW

The recital of the United States District Court for the Western District of Missouri, Western Division, delivered August 7, 1940, by Honorable Merrill E. Otis, Judge, is set forth at pages 22-25 of the Record. Recital of the same court in overruling motion for new trial is set forth at pages 26-28 of the Record.

The memorandum opinion and judgment of the District Court for the Western District of Missouri, Western Division, Honorable Merrill E. Otis, Judge, delivered July 31, 1941, is found at pages 3-4 of the Record in case No. 12,120.

The opinion of the Circuit Court of Appeals for the Eighth Circuit, delivered by Sanborn, Judge, is set forth at pages 19-22 of the Record in case No. 12,120, and is reported in 127 Fed. (2d) 1.

JURISDICTION

This Petition is filed within thirty days of May 7, 1942, the date on which the petition for rehearing was denied by the Eighth Circuit. The jurisdiction of the Court is invoked under *Section 240 (a) of the Judicial Code* as amended by the Act of February 13, 1925; 43 Stat. 938.

STATEMENT OF THE CASE

A summary statement of the facts is given in the Petition, pages 1 to 5 above.

STATUTES INVOLVED

This case involves the *Liquor Enforcement Act of 1936,* 27 U. S. C. A., Sec. 223, 49 Stat. 1928, C. 815, Sec. 3.

SPECIFICATIONS OF ERROR TO BE URGED

I.

The Court erred, in admitting, over the objections of the defendant, evidence of statements alleged to have been made by the defendant, concerning a load of whiskey supposedly purchased by him at Alton, Illinois, about November 15, 1939, and supposedly taken by him to Houston, Texas, and supposedly consumed there by the defendant and his sister-in-law, said evidence being incompetent, irrelevant and prejudicial.

II.

The findings, verdict and judgment of the Court are not supported by the Record.

(a)

All of the substantial evidence is as consistent with innocence as with guilt, and it was the duty of the trial court to sustain our motion for acquittal.

(b)

Our motion for acquittal should have been sustained because the Government failed utterly to prove that the whiskey being transported by Mr. Daniel was not accompanied by a permit.

(c)

The findings, verdict, and judgment of the Court are not based on evidence, but rest upon inference based on inference and presumption based on presumption.

SUMMARY OF ARGUMENT

I.

The Court erred, in admitting, over the objections of the defendant, evidence of statements alleged to have been made by the defendant concerning a load of whiskey supposedly purchased by him at Alton, Illinois, about November 15, 1939, and supposedly taken by him to Houston, Texas, and supposedly consumed there by the defendant and his sister-in-law, said evidence being incompetent, irrelevant and prejudicial.

Gart v. *United States,*
294 Fed. 66, l. c. 67-68;
Neff v. *United States,*
105 Fed. (2d) 688;
Hall v. *United States,*
(Ninth Cir.) 235 Fed. 869, 870, l. c. 691-692.

II.

The findings, verdict, and judgment are not supported by the Record.

(a)

All of the substantial evidence is as consistent with innocence as with guilt, and it was the duty of the trial court to sustain the motion for acquittal.

General Statutes of Kansas, 1935,
Section 21-2185;

Harrison v. *United States,*
200 Fed. Rep. 662;
Oras et al v. *United States,*
67 F. (2d) 463.

(b)

Our motion for acquittal should have been sustained because the Government failed utterly to prove that the whiskey being transported by Mr. Daniel was not accompanied by a permit.

Laws of Kansas, 1939,
Chapter 179.

(c)

The findings, verdict, and judgment of the Court are not based on evidence, but rest only upon inference based on inference and presumption based on presumption.

General Statutes of Kansas, 1935,
Section 21-2185.

ARGUMENT

I.

The Court erred, in admitting, over the objections of the defendant, evidence of statements alleged to have been made by the defendant concerning a load of whiskey supposedly purchased by him at Alton, Illinois, about November 15, 1939, and supposedly taken by him to Houston, Texas, and supposedly consumed there by the defendant and his sister-in-law, said evidence being incompetent, irrelevant and prejudicial.

Since the defendant was charged with an attempt to commit a crime, it was of prime importance that the Government prove the criminal intent with which Mr. Daniel was transporting the liquor on the date of his arrest. The Government could offer no direct proof on this point for Mr. Daniel stated that he was taking the liquor to Texas and denied that he was taking it to Kansas. So the Government's attempt to prove the criminal intent was limited to circumstantial evidence, and in trying to bolster its case the following testimony, given by the highway patrolman who arrested Mr. Daniel, was received over our objections (Case 12,120, R. 10):

> "and he did state further in that conversation that he had made another trip once before with a similar load, had taken it back to Texas to his sister about a week or something, a few days before and used it for their own consumption."

Also over our objection, Mrs. Reece, the defendant's sister-in-law, who lived at Houston, Texas, was permitted

to testify that Mr. Daniel never brought any liquor to her house (R. 29).

We objected that all evidence touching this load of whiskey taken to Texas by the defendant at least a week previous to the date of his arrest was incompetent, irrelevant, immaterial and prejudicial. The court overruled our objections and allowed exceptions, holding that the evidence was competent and stating frankly that he considered the evidence damaging and prejudicial to the defendant (R. 24) and the Court held to the same ruling when the motion for new trial was submitted (R. 27), and at the second trial adopted all of the court's oral discussion made at the first trial (Case 12,120, R. 3-4).

The trial judge said:

> "Certainly there can be no question at all that the testimony of the government witnesses as to what the defendant said when he was arrested was competent in evidence against him. The whole statement was a statement which was made at one time and in one connection. The whole statement including that part to which objection is made — was made by the defendant in explanation of the act in the commission of which he was apprehended. He was making the point that this liquor that he was then transporting was about to be transported to Texas, that that was his purpose, that that was his intention, that that was not the first time he had carried liquor to Texas, that he had carried liquor to Texas a short period theretofore; that he had carried that liquor, that is the previous load of liquor, for the same purpose for which he was carrying liquor in the possession of which he was apprehended, namely; he was carrying it for personal consumption by himself and his sister-in-law, and to prove the truth of that statement he said the first load of liquor had been consumed by

himself and his sister-in-law. Of course, that statement was competent; and it was prejudicial, because it made it impossible for the tryer of the fact to believe anything the man had said in his statement; I mean the statement that he and his sister-in-law had consumed in three or four days time fourteen cases of whiskey was so ridiculous and absurd that it threw everything he said into great doubt."

Since the court itself declared that the evidence was prejudicial, it only remains to determine if it was competent or not. If it was competent, no error was committed, of course, in receiving the evidence. If it was incompetent, then prejudicial error is present.

In *Gart* v. *United States*, 294 Fed. 66, the Eighth Circuit said, l. c. 67-68:

> "The rule which should apply to this case, has been clearly stated by Judge Sanborn, of our own circuit, in the case of Paris v. United States, 260 Fed. 529, at page 531, 171 C.C.A. 313, 315, in the following language:
>
> > " 'The general rule is that evidence of the admission by a defendant of an offense similar to that for the alleged commission of which he is on trial is not admissible to prove his commission of the latter offense. Boyd v. United States, 142 U. S. 454, 456, 457, 458, 12 Sup. Ct. 292, 35 L. Ed. 1077; Hall v. United States, 150 U. S. 76, 81, 82, 14 Sup. Ct. 22, 37 L. Ed. 1003; 16 C. J. 586, Sec. 1132. To this general rule there are exceptions. One of them is that, where the criminal intent of the defendant is indispensable to the proof of the offense, proof of his commission of other like offenses at about the same time that he is charged with the commission of the offense for which he is on trial may be received to

prove that his act or acts were not innocent or mistaken, but constitute an intentional violation of the law. In cases falling under such an exception to the rule, however, it is essential to the admissibility of evidence of another distinct offense that the proof of the latter offense be plain, clear, and conclusive. Evidence of a vague and uncertain character regarding such an alleged offense is never admissible. Baxter v. State, 91 Ohio St. 167, 110 N. T. 456; State v. Hude, 234 Mo. 200, 136 S. W. 316, Ann. Cas. 1912D, 191; 16 C. J. 592; People v. Sharp, 107 N. Y. 427, 469, 14 N. E. 319, 1 Am. St. Rep. 851; State v. LaPage, 57 N. H. 245, 259, 24 Am. St. Rep. 69; Fish v. United States, 215 Fed. 545, 549, 132 C.C.A. 56, L.R.A. 1915A, 809. Such evidence tends to draw the attention of the jury away from a consideration of the real issues on trial, to fasten it upon other questions, and to lead them unconsciously to render their verdict in accordance with their views on false issues rather than on the true issues on trial. Speaking of evidence of other similar offenses, the Circuit Court of Appeals of the First Circuit, in the case last cited, well said:

> " ' "Evidence of this character necessitates the trial of matters collateral to the main issue, is exceedingly prejudicial, is subject to being misused, and should be received, if at all, only in a plain case." ' "

This rule has been many times restated. In *Neff* v. *United States,* 105 Fed. (2d) 688, the opinion quotes from *Hall* v. *United States,* 9 Cir., 235 Fed. 869, 870, l. c. 691-692:

" 'The intent and disposition with which one does a particular act must be ascertained from his

acts and declarations before and at the time; and when a previous act indicates an existing purpose, which from known rules of human conduct may fairly be presumed to continue and control the defendant in the doing of the act in question, it is admissible in evidence. In many cases it is the only way in which criminal intent can be proved; and the evidence is not to be rejected because it might also prove another crime against the defendant. The practical limit to its admission is that it must be sufficiently significant in character, and sufficiently near in point of time, to afford a presumption that the element sought to be established existed at the time of the commission of the offense charged. The limit is largely in the discretion of the judge.'

"To come within the exception the act or offense testified to must be similar in character to, and closely connected with, the offense charged.

" 'There must appear, between the extraneous crime offered in evidence and the crime of which the defendant is accused, some other real connection, beyond the allegation that they have both sprung from the same vicious disposition.' State v. Raymond, 53 N. J. L. 260, 21 A. 328, 330; Chitwood v. United States, 8 Cir. 153 F. 551, 11 Ann. Cas. 814; Prettyman et al v. United States, 6 Cir., 180 F. 30; Colt v. United States, 8 Cir., 190 F. 305; Minner v. United States, 10 Cir., 57 F. (2d) 506."

But the evidence offered by the Government concerning the previous load of whiskey falls far short of the requirements of the rule for many reasons, among which we enumerate the following:

(1) There is no direct proof that the previous load of whiskey was transported into Kansas by the defendant.

(2) The Record is entirely devoid of proof that Mr. Daniel was in the state of Kansas at any time from the date of purchase of the previous load of whiskey to and including the date of his arrest, so there is no evidence in the Record from which it can be even remotely inferred that the previous load of whiskey was transported by Mr. Daniel to Kansas.

(3) There is no proof in the Record that Mr. Daniel transgressed any law in purchasing and transporting the previous load of whiskey.

(4) The fact, if it be a fact, that the previous load of whiskey purchased by Mr. Daniel did not reach Texas does not prove that it was taken into the state of Kansas, nor will this be inferred in the absence of clear proof to the contrary, for there is a presumption of innocence thrown about the defendant's transactions with the previous load of whiskey which can only be overcome by evidence rebutting it. There is no such evidence in this Record.

(5) If we concede, but only for the purpose of this argument, that Mr. Daniel lied to the state highway patrolman regarding the destination and disposition of the previous load of liquor, that of itself does not prove that the previous load of liquor was taken into Kansas and furnishes no basis from which such fact may be inferred.

In *Gart* v. *United States, supra,* the defendant was charged with the unlawful sale of narcotics upon the streets of Denver. Evidence was introduced by the Government which tended to show that, at a different time and place upon a street in Denver, the defendant delivered a package to another party. This testimony was objected

to. The Government failed to prove by any testimony what the package so delivered contained. The defendant's motion to strike the testimony was denied by the trial court and proper exception taken. The court said, l. c. 67:

> "It must be apparent that such a line of testimony if not properly admissible would be highly prejudicial. Standing as evidence before the jury, it might easily lead them to the conclusion that the defendant was in the habit of making sales of narcotics on the streets by delivering packages containing the drug to persons indiscriminately, and yet there was no proof that the package so testified as having been delivered by the defendant at a time and place not charged in the indictment contained narcotic drugs. This left the matter in the nature of a mere suspicious circumstance, which not having been taken from the jury by the trial court left it with them for consideration.
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> "The scope and purpose of testimony concerning similar offenses is limited, as has been laid down in the Supreme Court of the United States in the cases of Boyd v. United States, 142 U. S. 454, 12 Sup. Ct. 292, 35 L. Ed. 1033. Only in exceptional cases is the proof of such transactions admissible. Where a case falls within the exception, the proof must be clear and convincing. It will be unnecessary to discuss the point in this case as to whether or not this line of testimony fell within the exception to the general rule governing the proof of similar offenses, for the reason that in the case at bar we have no proof of an offense, but merely proof of a suspicious circumstance."

The reasoning of this Court in the case just quoted fits the case at bar like a glove. The evidence concerning

the previous load of whiskey neither proved nor tended to prove any crime and shed no light on the question of intent and was merely a suspicious circumstance which sorely prejudiced the defendant before the trial court. The trial judge said so himself, and he drew inferences from the testimony on which the conviction was based, and the Eighth Circuit draws the same inferences in its opinion, yet the Eighth Circuit said that the testimony was not prejudicial to the tryer of fact. The Eighth Circuit is wrong. Since the trial judge himself said that the testimony was prejudicial, it was the duty of the Eighth Circuit to weigh the competency of the testimony complained of. It failed so to do.

We respectfully urge that the testimony was incompetent under the weight of all authority, and that it is the duty of this Court to declare that in such situations the trial court and the appellate courts must weigh the competency of evidence where prejudice is shown, even though there has been a waiver of trial by jury. A sound public policy and the protection of the individual citizen in his rights so demand.

II.

The findings, verdict, and judgment are not supported by the Record.

(a)

All of the substantial evidence is as consistent with innocence as with guilt, and it was the duty of the trial court to sustain the motion for acquittal.

All of the substantial evidence in the Record shows a state of facts as fully consistent with the hypothesis of innocence as with that of guilt. In support of this statement we point to the following facts:

(1) At the time of his arrest Mr. Daniel was apprehended traveling in a southerly direction on U. S. Highway No. 71 by-pass, about 4 miles south of its intersection with U. S. Highway No. 50. He said he was on his way to Texas. The court will take judicial notice as did the trial court that U. S. Highway No. 71 by-pass runs into and joins Highway No. 71 and proceeds south through Missouri into Arkansas, and the court will take judicial notice that Highway No. 71 does not lead into Kansas.

(2) The court will take judicial notice as did the trial court, that U. S. Highway No. 50 runs directly to Emporia, Kansas, where the Government contends Mr. Daniel was taking the whiskey. The undisputed evidence is that he was already 4 miles south of Highway 50, proceeding in a southerly direction, when apprehended.

(3) The court will take judicial notice that travelers proceeding south on Highway 71 can reach Texas following the usual and normal routes without entering any state affected by the Liquor Enforcement Act of 1936, that is, any state which prohibits the transportation of liquor, and the court will take judicial notice that it was legal and lawful for Mr. Daniel to transport liquor through Missouri, Arkansas, Louisiana and Texas.

(4) The court will take judicial notice that under *Section 21-2185 of the General Statutes of Kansas, 1935,* which section is reprinted for the convenience of the court

in an appendix to this Brief, it is lawful to transport liquor across Kansas in interstate transportation; that it is not necessary to obtain a permit for such transportation before the liquor actually reaches Kansas; that it is only necessary that the driver of a vehicle containing liquor to be transported across Kansas, stop at a port of entry, have the liquor sealed, and declare the route to be pursued by him across Kansas, and then proceed without obtaining any permit, so that it would have been lawful for Mr. Daniel to have entered Kansas with the load of liquor he was transporting to Texas.

The Government proved by its own witness (R. 20) that some three weeks before his arrest Mr. Daniel had declared his intention of going into the liquor business at Houston, Texas. He had purchased a liquor stamp at that place (R. 29). He had bought Texas license plates for his car (R. 20). He was on his way to Texas.

These facts all tend to prove that Mr. Daniel was on his way to Texas. These are the same facts which the Government contends prove he was on his way to Kansas.

Omitting the incompetent testimony discussed in the preceding section of this Brief, any tryer of fact would be compelled to the conclusion, on this Record, as a matter of law, that Mr. Daniel was actually on his way to Texas when apprehended. But even if we consider the incompetent evidence, yet all the evidence in this Record, as a matter of law, is as consistent with the hypothesis of innocence as with guilt, and it does not exclude the hypothesis of innocence as a matter of law, and so the opinion of the Eighth Circuit is in conflict with the ruling of the Sixth Circuit in *Harrison* v. *United States*, 200 Fed. Rep. 662, and the opinion of the Eighth Circuit conflicts

with that of the Ninth Circuit in *Oras et al* v. *United States,* 67 F. (2d) 463, in not rejecting the incompetent evidence in determining if there was sufficient substantial evidence to sustain the conviction.

(b)

Our motion for acquittal should have been sustained because the Government failed utterly to prove that the whiskey being transported by Mr. Daniel was not accompanied by a permit.

At the time Mr. Daniel was apprehended by the state highway patrolman, he was taken into custody and taken to the state highway patrol headquarters at Lee's Summit (R. 10), and agents of the Internal Revenue Department were called and took charge of the liquor and brought it to Kansas City and placed it in storage in the government warehouse (R. 15). The state highway patrolman testified as to certain documents in Mr. Daniel's possession at the time of his arrest (R. 11) which were placed in evidence by the Government (R. 13); these documents are described at pages 29-33 of the Record.

Nowhere does it appear that these were the only documents in Mr. Daniel's possession, or that they were all the documents in Mr. Daniel's possession, and nowhere does it appear that the liquor was not in fact accompanied by the permit described by *Chapter 179 of the Laws of Kansas, 1939,* which provides for the importation of intoxicating liquor into the state of Kansas by permit.

This is a criminal proceeding and it is incumbent upon the Government to prove every element of the crime charged. The indictment on which Mr. Daniel was

tried charges that the liquor was not then and there accompanied by any permit or license therefor as required by Laws of Kansas (R. 2). The failure to obtain a permit and affix it to the liquor package is an essential element of the crime charged and must be proved by positive evidence. It was susceptible of ready proof by positive evidence since the Government had seized the liquor which was being transported by Mr. Daniel and yet had it in its possession at the time of the trial.

The court erred in failing to sustain our motion for acquittal since the evidence was insufficient to sustain a conviction, especially as to this necessary element.

(c)

The findings, verdict, and judgment of the Court are not based on evidence, but rest only upon inference based on inference and presumption based on presumption.

On this Record, to find the defendant guilty of the crime charged, the verdict and judgment can only be based on inference built on inference, and presumption built on presumption. This is true because the Record as it stands, plus only permissible inferences, does not warrant a conviction. To reach a judgment of guilt, on this Record, it is necessary that these mental processes occur:

(a) We find that the defendant lied when he said he did take the previous load of whiskey to Texas. (This is an uncertainty because it was not shown that he did not in fact take the previous load of whiskey to Texas.)

(b) Since we have found that the defendant lied about the previous load of whiskey, we infer that he was

lying about the destination of the load of liquor in his car at the time of his arrest. (This is also an uncertainty.)

(c) Since we have found that the defendant lied about the previous load of whiskey, and have found that he was lying about the destination of the cargo of whiskey in his car at the time of his arrest, we infer that he was taking this last load of liquor into Kansas. (This is also an uncertainty.)

(d) Since we have found that the defendant lied and have inferred that he was taking the liquor into Kansas, in order to convict him we must further infer that at some point, after he had passed the place at which he was apprehended, he would turn to his right toward the direction of Kansas and actually enter it. (This is also an uncertainty.)

(e) Since we have found that the defendant lied about going to Texas, and have inferred that he was going to Kansas, and have inferred that he was going to turn onto some road which leads into Kansas, in order to convict him of the crime, we must further infer that he would seek to enter Kansas on a road which had no port of entry, or that if he did enter Kansas on a road which did have a port of entry on it, that he would either fail to declare his load of liquor and have it sealed, and declare his route, and later deviate from his route, or that he would attempt to sneak past the port of entry without any declaration. (These are all uncertainties.)

In our statement of the case and in our statement of the facts and permissible inferences above made, we have sought to include every element of proof offered at the trial by the Government. We invite the Government

to make whatever legitimate inference it may to begin with, from the facts in evidence, and then demonstrate or show that a verdict of guilty can be reached without using all of the inferences based on inferences which we have pointed out above.

No permit for the transportation of liquor across Kansas is required or can be obtained until a port of entry is reached (see appendix), and had Daniel actually entered Kansas with the liquor, on a road leading to a port of entry, the law would presume that he was doing so with a legal intent, and that he would stop at a port of entry as required by law, and this presumption continues and holds until substantial evidence to the contrary appears. There was no such evidence.

Inferences built on inferences and presumptions on presumptions are not substantial evidence, and since there is no substantial evidence in the Record it is the duty of this Court to reverse the judgment.

CONCLUSION

Today, when millions offer to die that liberty may live, it is more important than ever to safeguard the liberty of the individual, and we humbly urge that it is still the duty of this Court, confronted as it is by a deluge of important litigation brought about by the stress of economic change and emergency, to heed and consider the just complaints of the lowliest. Mr. Daniel was convicted of a misdemeanor, but he was denied a fair trial in accordance with authority, and the principles for which he here contends are important not only to himself, but to every liberty-loving citizen, and we ask that this Honor-

able Court grant the writ prayed for so that the matters complained of may be fully briefed, argued and determined, and justice done.

Respectfully submitted,

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